STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

INQUIRY INTO LOBBYING

SUBMISSION RECEIVED FROM PROFESSOR WILLIAM V LUNEBERG

I thank the Committee for this opportunity to offer a written submission with regard to your inquiry respecting the need for a lobbyist registry for Scotland.

I have included at the end of this presentation a copy of my resume (Attachment 1) to give you a sense of my professional background. Briefly stated, I am an attorney (retired) and Professor Emeritus of Law at the University of Pittsburgh School of Law. Since 1995, when Congress enacted the current centerpiece of national lobbying law (the Lobbying Disclosure Act), a large portion of my professional activity aside from teaching has dealt with lobbying disclosure and related issues at the federal level in the United States.

I think it might be helpful if I first offer a general overview of the role of disclosure in a representative democracy, a brief history of lobbying disclosure at the national level in the United States, and a description of how lobbying disclosure fits with the duty of confidentiality that may arise from the relationship between a lawyer-lobbyist and his or her client in the United States. Then I will move on to the specific questions presented in your call for evidence as to which I have some basis in experience to offer helpful commentary. (On some questions, particularly those involving Scottish law, I will defer to others in a much better position than I to offer helpful information.)

The Benefits of Lobbying Disclosure

Both lobbying and transparency are essential to modern representative government. With regard to the former, legislators cannot live in a “bubble” and adequately carry out their representative duties. They need, for example, an accurate sense of the issues that are important to their constituents, factual information relevant to resolving those issues as a matter of public policy, differing perspectives on how the issues should be resolved, and the legal and other arguments in favor of and against maintaining the status quo. Particularly in light of the complexities of modern life, providing all of those falls increasingly to professional lobbyists. But lobbying is not a new development. The First Amendment to the United States Constitution, ratified in 1791, protects against not only governmental impingement on freedom of speech, but also guarantees the historic right, originating in English law, “to petition the Government for a redress of grievances.” When challenges to the constitutionality of lobbying disclosure arise in the US, both the freedom of speech and the right to petition are inevitably at the heart of the legal arguments presented.

The role of transparency in a representative democracy is equally crucial. In his Gettysburg Address of November 1863, Abraham Lincoln famously described it as “government of the people, by the people, [and] for the people.” Accepting that as the essence of democracy, claims to confidentiality made by private interests in communicating with the people’s representatives and agents in order to serve their

own distinct agendas cannot survive scrutiny except in those carefully circumscribed and rare instances where confidentiality is essential to effective governmental operation.

But the justifications for transparency are more than theoretical—they are intensely practical, particularly today when trust in government has fallen to new lows. For example, the summary of discussions at the OECD Policy Forum on Restoring Trust in Government (November 2013) pointed to a recent poll conducted by its Trade Union Advisory Committee indicating that only 13% of the respondents thought that government acted in their interest.

As long ago as 1914, in his set of essays, Other People's Money and How the Bankers Use It, future Supreme Court Justice Louis D. Brandeis remarked that "(p)ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." More specifically, the principal justifications for transparency with regard to lobbying include the following, all of which relate directly or indirectly to the representative nature of government:

- preventing corruption of officials and the governmental processes in which they participate;
- preventing the appearance of corruption that might otherwise erode public confidence in the integrity of governmental decision making;
- improving the accountability of governmental officials whose actions and the possible reasons for those, once revealed, may force those officials to leave office or, at a minimum, change their positions in ways deemed to be more consistent with the public interest;
- allowing public officials to know who is trying to influence them or others in authority, thereby allowing them to take action to counter influences they deem inappropriate or otherwise inconsistent with the public interest; and, finally,
- 'leveling the playing field' among groups attempting to influence governmental decision making by permitting responses (that is, counter-lobbying) to counteract the efforts of those who might otherwise be able to achieve their aims more effectively 'behind closed doors."

Since 1954, when Congress's first lobbying disclosure regime was challenged before the US Supreme Court, and in the succeeding years as various disclosure regimes applicable to lobbying have come before Congress and the US courts, one or more of these justifications have proven crucial in supporting transparency.

As will more fully appear from the discussion below, an associated benefit from transparency is protecting the integrity of the lobbying community itself, which is significantly diminished by lobbying scandals. Low public esteem for lobbyists may, in turn, undercut their effectiveness in representing their clients even when they are engaged in entirely appropriate behavior as politicians and administrators attempt to keep their distance or discount the credibility of lobbyists' presentations.

It is true that anonymity does have an important role to play in a democracy committed to the principle of free speech. This too has been repeatedly recognized by the US Supreme Court in cases involving speech in the public forum (e.g. during

an election contest). The rationale offered is that threatened disclosure of a speaker's identity may, in some instances, deter speech for fear of retribution from others and thereby impoverish the public dialogue that is crucial to the determination of governmental policy. However, when anonymity is transplanted to instances where lobbyists communicate directly with legislators and administrators, non-disclosure threatens not to enrich the quality of the dialogue, but rather to interfere with the ability of public officials to hear all sides at a crucial point in the policy-making process and, thereby, to fully deliberate on what courses of action are in the public interest. Claims to non-disclosure in the lobbyist-legislator context are particularly difficult to accept since lobbyists do not seek anonymity in dealing with the persons they are seeking to influence, indeed that would minimize the effect of the lobbyist's efforts at persuasion; but the general public, without disclosure, is left in the dark. In other words, a lobbyist's claim to anonymity is inherently selective and opportunistic. Finally, as US Supreme Court Justice Antonin Scalia has noted, "'[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed" (Doe v. Reed 2010, concurring opinion).

Years ago, in dealing with a challenge to a federal agency's determination of the rights of cable TV broadcasters, a prominent federal appellate court was alerted to the fact that some interests involved in the rulemaking at issue met with the agency behind closed doors while other interests were not afforded that same opportunity. In upholding a challenge to the rules on procedural grounds, the court observed:

> Although it is impossible to draw any firm conclusions about the effect of ex parte presentations upon the ultimate shape of the pay cable rules, the evidence is certainly consistent with often-voiced claims of undue industry influence over [Federal Communications] Commission proceedings, and we are particularly concerned that the final shaping of the rules we are reviewing here may have been by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners. (Home Box Office v. Federal Communications Commission, 1977, Court of Appeals for the District of Columbia Circuit.)

The very same concerns arise whether the contacts between lobbyists and decision-makers involve administrative personnel as in this case or, rather, legislators considering the introduction and passage or defeat of bills.

A Short History of Lobbying Disclosure Legislation in the United States

There is a rich and colorful history of lobbying scandals, or at least the appearance of scandal, reaching back into the middle of 19th century America. With the victory of the United States government in the Civil War, the federal government expanded its reach to include areas previously the subject of state and local legislation. Along with that came increased legal authority to raise money and the desire to spend it in order to implement federal policies. With more at stake on the national level, lobbying in Washington increased dramatically. Not surprisingly the temptation to rely on tactics going beyond mere provision of information and argument to legislators became well-neigh irresistible, with outright bribery and "artificially"

created “grassroots” campaigns figuring among the tools employed to achieve certain legislative goals.

However, it was not until 1946 that Congress enacted the first general federal lobbying disclosure legislation. Interestingly, it did not originate as the immediate reaction to governmental scandal, though lobbying abuses discovered during the 1930’s were clearly an important part of the legislative history of the Federal Regulation of Lobbying Act (FRLA). Once on the books, however, the statute was rarely enforced and, accordingly, never taken seriously by the lobbying community. The FRLA was poorly drafted and, accordingly, not easily understood; it was also both over-inclusive (requiring, for example, detailed reporting of telephone bills and individual cab fares paid by lobbyists) and under-inclusive (applying only to lobbying Senators and Representatives and not their staffs or administrative agencies).

It took another 50 years and a variety of scandals, including the series of illegal acts and improprieties that are known as “Watergate,” to bring about replacement of the FRLA with the Lobbying Disclosure Act of 1995 (LDA). That statute aimed to avoid both the over-and under-inclusiveness of its predecessor as well as the lack of enforcement that had plagued the FRLA. Briefly stated, the law required the identification of who was lobbying whom, on what general and specific issue or issues, and for what fees (in the case of a lobbying firm) or at what expense (in the case of an organization that lobbies on its own behalf). At this point I will omit a detailed discussion of the various features of the LDA and, rather, briefly touch on those as necessary in responding to the Committee’s specific questions.

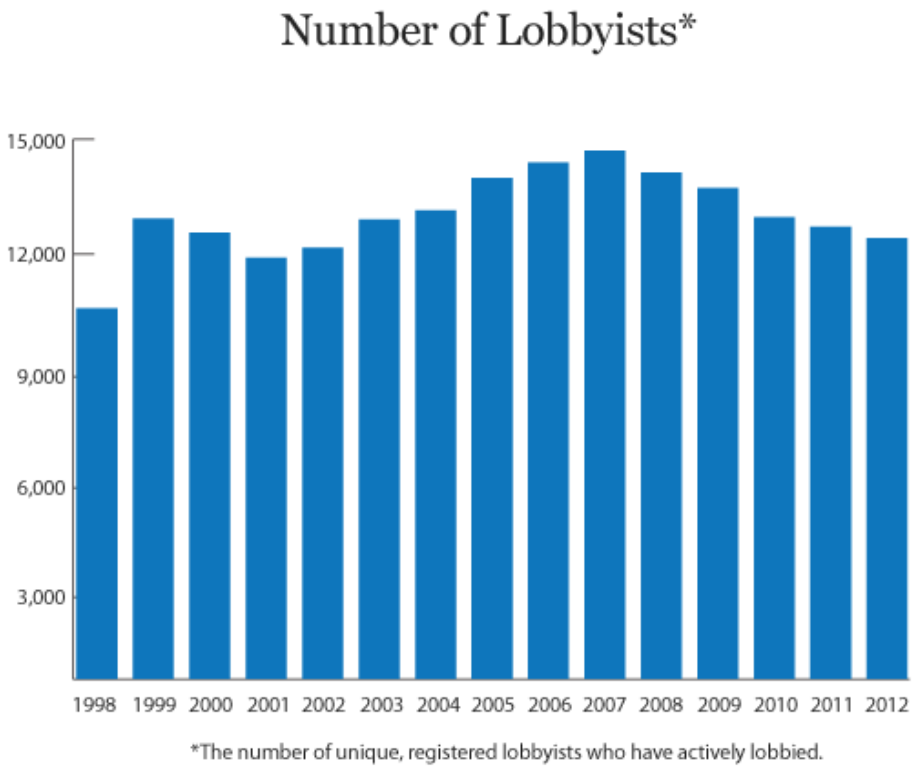
However, if the Committee wishes more detailed information on the LDA’s administration, I have attached the three required disclosure forms (LD-1, registration; LD-2, quarterly updates and reports of lobbying activity; and LD-203, which deals with lobbyist political contributions and other payments to or for the benefit of certain legislative and executive branch officials). To afford the Committee a better sense of what is involved in completing these forms, all of them are copies of actual forms filed by the University of Pittsburgh or its Medical Center as registrants; they were downloaded from the LDA’s public database. I have also included the relatively succinct and only authoritative description of LDA registration and reporting obligations, the semi-annually updated Lobbying Disclosure Act Guidance, issued jointly by the Secretary of the Senate and the Clerk of the House of Representatives who are responsible for LDA administration and some enforcement duties. These are, respectively, Attachments 2a, 2b, 2c, and 2d.

One of the difficulties in administering any lobbying disclosure regime is identification of persons who do not register where the law requires it; it is far easier to determine if the registrations and required reports on file comply with the law’s requirements. Enforcement of the LDA in the United States has to date, therefore, focused entirely on the latter. It is clear, however, that, with the adoption of the LDA, thousands more lobbying firms and organizations registered than had done so under the old law. Within less than three years of the LDA’s enactment, the US General Accounting Office (now the Government Accountability Office, the investigative arm of Congress) reported:

Overall, almost two-and-a-half times as many organizations and individuals were registered or identified under the 1995 act compared with those who had been registered under the 1946 act. We found that 10,612 organizations and individuals registered under the 1995 act who had not been previously registered under the 1946 act.

Recently, the Center for Responsive Politics, a watchdog group, prepared the following chart of the number of active lobbyists registered under the LDA for the years 1998-2012:

Table 1



Indeed, for some lobbying firms, the new law offered a wonderful advertising bonus since annual newspaper rankings of the "top" lobbying firms in terms of income earned, which are based on reports filed under the LDA, could be touted by those firms in seeking new clients or impressing existing ones.

Some commentators on the LDA questioned the adequacy of the disclosure regime as it was adopted in 1995. But it took another scandal--one involving Republican lobbyist Jack Abramoff whose double-dealing and other unseemly and illegal practices came to light during the Administration of President George W. Bush--to force Congress's hand in amending the LDA to require more frequent and detailed reporting. The LDA now extends to disclosure of some of the increasingly important linkages (in the United States at least) between lobbyists' raising and spending money, on the one hand, and government officials on the other.

That, as a matter of US history, scandal has been the immediate impetus to the enactment and reform of lobbying disclosure legislation is not a sound basis to argue that lobbying disclosure is justified only on proof or strong suggestion of misbehavior. Indeed, the summery of discussions at the recently completed OECD Policy Forum on Restoring Trust in Government (November 2013) noted that it was "*particularly important to act preventively*, when scandals have not occurred yet" (emphasis in original).

As noted above, transparency with regard to lobbying pressures is demanded by the nature of representative government, scandals notwithstanding. Moreover, the practical purposes of such legislation are proactive--to minimize the potential for misdeeds and inappropriate behavior that undercuts the ability to make policy in the public's interest and to avoid undermining public confidence in governmental processes and the deleterious effects that flow therefrom. In short, waiting for scandal to occur before acting is a lot like waiting for the horse to escape before closing the barn door. In addition, legislation, at least in the United States, that has been enacted solely in response to a particular set of circumstances capturing public headlines has often proved to be seriously inadequate. Such knee-jerk legislation may be poorly thought out and, accordingly, poorly drafted as well as limited in its focus to what has already happened, not what may happen in the future. Legislating before scandal, after a thoughtful and through examination, is the only responsible way to proceed to protect the decision-making processes of representative government; and it is the only modus operandi that will maximize the effectiveness of the legislation in achieving its goals.

Lobbying Disclosure and the Attorney's Duty of Confidentiality

In concluding this overview, it is important to note, that while a variety of policy and other objections to various types of lobbying disclosure at the national level have been raised in recent years during the debates on the LDA and its amendment and while the legal profession (particularly the American Bar Association) has been active in the reform debate, resistance to registration and reporting has not been premised to any significant degree on the duty of confidentiality that an attorney owes his or her client. Indeed, it would have been difficult, if not impossible, to rely on that duty to resist the types of disclosure that are mandated by the LDA. There is no requirement in the law now to disclose communications between attorney and client and there have been no proposals put on the table to mandate such disclosure. Moreover, the American Bar Association's own Model Rules of Professional Conduct allow an attorney to reveal "information relating to the representation of a client" in order "to comply with other law . . .." (See Model Rule 1.6(b)(6)). Federal and state lobbying disclosure statutes and regulations constitute such "other law." Whether that "other law" should be enacted and what it should provide depends, of course, on how the legislature balances the interests in transparency that I have already discussed against the financial and other burdens of registration and reporting. Those burdens certainly must take into account any impact on attorney confidentiality. But, as the discussion below will demonstrate, the level of detail mandated by effective lobbying disclosure law need not be so great as to come close to significantly compromising clients' interests.

Both lawyers and non-lawyers lobby and register under state and federal lobbying law; and while the exact percentages are unknowable with any certainty, it is likely that the respective numbers of lawyers and non-lawyers that fill the ranks of registered professional lobbyists in Washington do not differ by orders of magnitude. While lobbying as such is not generally considered the practice of law in the US (and, therefore, not subject to professional ethics codes for attorneys), mingling lobbying with more traditional lawyerly services for a client (as is often the case) is regulated by jurisdictions whose rules of professional conduct are based on the ABA's Model Rules (See Model Rule 5.7).

In short, whether an attorney acts only as a lobbyist in serving clients or provides lobbying along with other services, at least in the United States the attorney's general duty of confidentiality has not been and cannot be an objection to lobbying disclosure as it is generally implemented, that is to say, where there is no compelled disclosure of attorney client communications. And the constitutional rights to free speech and to petition the government have never been interpreted to grant special protection to lawyers and their clients in resisting lobbying disclosure any more than they have been viewed as protection against disclosure where an attorney is not the lobbyist. If there are persuasive objections to lobbying transparency as it generally exists in various jurisdictions, they are based primarily on the financial burdens of registration and reporting. But such burdens can be minimized by carefully drawn disclosure provisions, as I will discuss further below.

Responses to the Committee's Questions

1. Have there been significant changes over the last decade in the way that lobbying is carried out? Is there a problem or perceived problem with lobbying in Scotland? If so, how can this best be addressed? If not, do steps still need to be taken to address any problems arising in the future? To what extent will the introduction of a register of lobbyists address any problem or perceived problem with lobbying?

I group these questions together because of their interrelationship and the fact that they have been basically addressed by what I have said in my general overview.

The heart of the matter is the second listed issue. And that question is, with all due respect to the Committee, ambiguously phrased. If it is asking whether lobbying in Scotland is intrinsically bad, the answer is obviously "no." As I have said, lobbying is essential to the operation of any representative democracy; in that sense there is absolutely no "problem" with lobbying in Scotland.

Perhaps, however, the question posed is whether lobbying at Holyrood, as a matter of empirical fact, involves illegal, unethical, or other inappropriate behavior. I obviously have no factual information to offer the Committee to support or contradict any allegations or suspicions in that regard. However, again from what I have said in my introduction, the proven existence or strong suspicion of impropriety is, given the representative nature of the Scottish government, irrelevant to the need for lobbying transparency; the public, whose government this is, has an inherent right to know who is seeking to influence the operation of governmental decision-making. Moreover, while scandals are not inevitable, history does suggest that the more that

is at stake in legislative and administrative decision making, the more temptation exists to stray from appropriate to inappropriate means of influence. And the devolved matters committed to Parliament (e.g. health, environmental regulation, and agriculture) certainly qualify as matters where very much may be at stake now and in the future. Waiting for possible scandal to occur before adopting reactive legislation is not worth the risks presented; once public trust in the government has been eroded, it may take a long time to rebuild it. Moreover, such reactive legislation, enacted in the heat of political controversy, may stray very far from the type of effective lobbying disclosure regime the Scottish people deserve.

2. Should [a registry] be voluntary or compulsory?

Regardless of the scope of any lobbying register, this question seems to be the next logical one to answer. If I am correct that lobbying disclosure is required by both the nature of representative government and the important practical benefits of disclosure in terms, for example, of helping to protect the integrity of the governmental decision-making processes along with their accountability, I believe there is no choice but to answer the question in the affirmative. Moreover, making it optional for lobbyists to register sends a message, in the strongest terms, that disclosure is not viewed as all that important. Not only that, but a voluntary system poses a difficult choice for lobbyists who believe strongly in governmental transparency: should they register while their "competition" does not and, more specifically, will their decision to disclose redound to their detriment and, if there is any possibility of that, why take a chance?

It is interesting to note that recent surveys of US, Brussels-based (EU), and European lobbyists generally (including some in the United Kingdom) indicated strong support for mandatory disclosure. (The first survey was taken in 2008, the second in 2009).

Table 2
Attitudes of US and Brussels-based (EU) Lobbyists [Holman 2009)

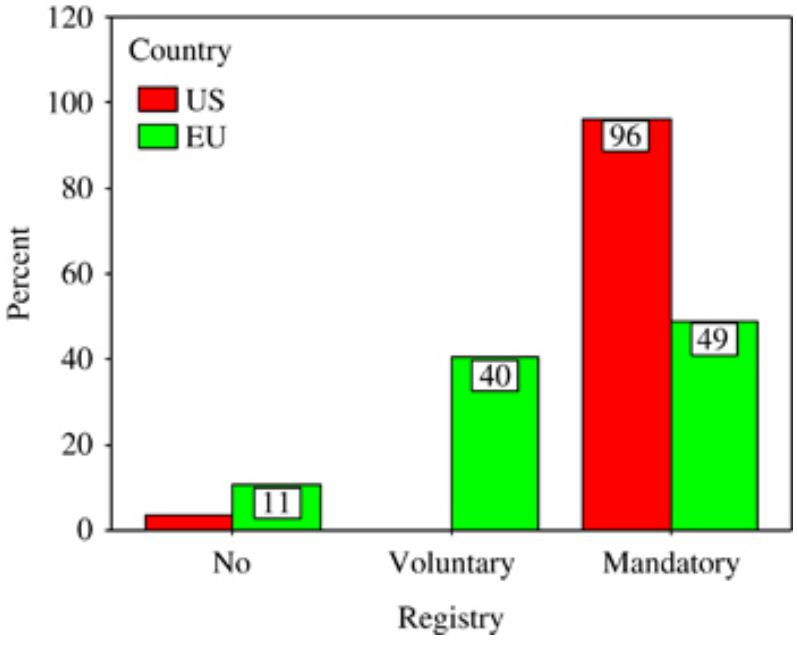
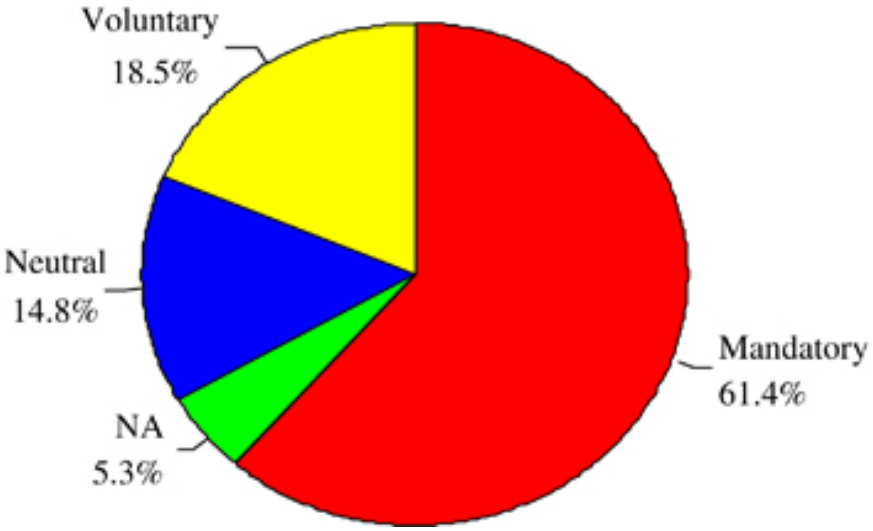


Table 3
Attitudes of European Lobbyists Generally [Holman and Susman 2009)



> And it is important to note that--
> the most often cited reason [for the support of a mandatory register] is to persuade the public that lobbying activity is a legitimate part of the policymaking process, not a behind-the-scenes influence peddling scheme. Although 57 per cent of European lobbyists believe that ethical transgressions by lobbyists are rarely or never a problem, 90 per cent of those lobbyists admitted that the public perceives there is such a problem
> (Luneburg and Holman 2012).

3. To whom should such a register apply? Should thresholds be set for registration? If so what should they be?

Again, these questions are interrelated and should be answered together.

In my view, these are the most difficult of the issues presented in crafting an effective and fair lobbying disclosure regime; this is true both on technical grounds and as a matter of policy. For instance, imposing registration and disclosure obligations on everyone may discourage lobbying by persons and entities that rarely get involved in lobbying, whose financial resources are minimal, and whose non-public approaches to public officials are unlikely to viewed as potentially corrupting with regard to the decision making processes of government. Also, disclosure may fairly be deemed unnecessary, of questionable value, or unwise with regard to some activities. Defining exempted activity with sufficient clarity can, however, present daunting challenges for legislators and legislative draftsman. Moreover, much of the line-drawing implicated may appear to be, or may in fact be, entirely arbitrary. During the long path to the enactment of the lobbying disclosure legislation in the US, determining appropriate coverage was an area of persistent controversy.

a. Definition of lobbying (in general). Central to the resolution of the question of coverage is the need to define "lobbying." At a minimum, the concept includes communications (whether oral, written or electronic) between persons outside the government and governmental officials, whether legislative or administrative, where

the communications are made *with the intent* to influence governmental decision-making processes, whether those processes establish policy or result in the distribution of government money or property. The LDA includes this list of areas as to which communications may trigger registration and reporting:

> i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
>
> (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
>
> (iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
>
> (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

Not all governmental officials have the authority to significantly determine the contours of public policy or the distribution of government money and property. Accordingly, covered activity can be limited to that which is directed to influence legislators, their staff, and the higher levels of the administrative bureaucracy (in the LDA known as “covered officials”).

b. Exempted communications. For a variety of reasons, not all communications even to this limited group of officials need trigger registration and disclosure. In the LDA, there are no less than nineteen categories of exempted communications (many with several subcategories). Those exempted communications are, in general, explained as either 1) not lobbying in its traditionally understood sense (e.g. providing information on the request of a legislative committee); 2) involving routine or inherently confidential communications (e.g. requests for status reports from agencies, communications regarding various pending civil or criminal investigations); 3) already subject to formal procedural safeguards (e.g., made in a trial-type adjudication); or 4) contained in a separate public record (e.g. comments presented in a rulemaking proceeding conducted by an agency).

The most controversial exemption from LDA coverage (which exists as a matter of legislative history, not legislative language) is that encompassing grassroots and grass-tops lobbying, which involve communications from constituents and/or their formal or informal leaders to lawmakers, often generated in the US by lobbyists or persons allied therewith (e.g. public relations firms). Untold millions of dollars each year are expended on these activities; they can, in some instances, have powerful effects on choices made by elected and appointed officials in doing their jobs. However, inclusion of grassroots lobbying had to be removed from the bill that became the LDA in order to insure its enactment in 1995. Attempts since 1995 to extend coverage to at least some aspects of grassroots lobbying (the frontend, that is, activities by professionals to generate grassroots responses) have failed for a variety of reasons including constitutional objections and political and policy

concerns that some groups would be disproportionately burdened by disclosure obligations.

Drafting the specific exemptions from the coverage of a disclosure regime is not easy and requires what may appear to some to be arbitrary distinctions (for example, what if a legislative request for information is prompted by lobbying activity itself?). In addition, the more exemptions exist, the more complicated the law becomes for potential registrants in determining their disclosure obligations. These complications are magnified by the inherent ambiguity of statutory language. And, of course, poor draftsmanship only further compounds the problem.

c. Coverage of "contract" and "employee" lobbyists. More specifically, should lobbying disclosure be limited only to those lobbyists who lobby on behalf of other persons and entities who are not their "employer" in the traditional common law sense or, rather, should it capture both that group as well as lobbyists who work on behalf of the company, association or other entity that employs them (again using the technical definition of "employ" as it is used in the common law for various purposes). While perhaps over simplifying matters in some respects, phrasing the question this way highlights, in my view, the irrelevance of the distinction between these two groups of lobbyists as it relates to the purposes of an effective lobbying disclosure regime. Why should registration and reporting turn on a technical legal distinction between independent contractor and employee that was developed for purposes having nothing to do with the need to ensure transparency in governmental decision-making? The answer to that question is, in my view, easy: such a distinction is entirely irrational in the lobbying context. Whether a lobbyist is paid an hourly fee (or a contingent fee where that is permitted) for influencing Legislator A to vote for or against a bill or, rather, that lobbyist receives a salary for his or her efforts, the effect of their actions is going to be the same: the attempt at influence works or falls short in either event. And in both instances, the client ultimately calls the shots and benefits (or not) from the lobbyist's work. Disclosure serves its important purposes in both cases.

It is an entirely different matter, however, to determine on whom the registration and reporting obligation should rest: on the individual lobbyist; on their "employer" (in the technical sense); or on the entity for whom the lobbying is done whether or not the lobbying is paid for by fee or salary. Under the LDA, the technical "employer" of the lobbyist is the registrant. So, for example, if lobbyist A is an employee (or partner) of Law Firm B and works as a lobbyist for General Motors, Law Firm B is the registrant. If lobbyist A is an employee of General Motors, however, GM registers. (In both instances, I am assuming all other registration thresholds are met.) In either case, the nature of the lobbying activity may be (indeed is likely to be) identical. As an abstract matter, I am not sure whether one approach is necessarily superior to another; local law or custom may be relevant here. I do think, however, there is a very good argument to be made in favor of requiring that the sole registrant be the client in all cases since then its registration and reporting forms will comprehensively collect in one set of documents all of the lobbying activity on its behalf. (I will refer to this hereafter as a "consolidated" registration and reporting system.) Unfortunately, under the LDA as it currently exists, interested members of the public must examine both the registration and reports of lobbying firms and those filed by their clients (assuming the client also lobbies on its own behalf by its "employees") to capture all

of the lobbying activity done on behalf of the client. This situation can also lead to misunderstandings by those searching the public database since the aggregated expense totals found on the client's periodic reports include fees paid to lobbying firms, which are also reported separately by the registered lobbying firms themselves.

d. "Thresholds" for registration. Of course, any prerequisite to coverage under a disclosure regime (for example, the non-exempt nature of the communication to a covered official) might be referred to as a "threshold" for registration. More commonly, however, thresholds refer to either monetary triggers or percentages of work devoted to lobbying, or both as is the case in the United States.

It is true, however that under the LDA a person must make more than one covered communication to a covered official in order to be considered a lobbyist and, if there is no lobbyist retained or employed, no registration obligation attaches. In that sense, the number of lobbying communications operates as a "threshold" to registration. This distinction between one and two communications is entirely arbitrary: one communication from a former prominent legislator or high executive branch official can sometimes do the trick as easily as a two or twenty from a lobbyist that lacks "clout." And, of course, as a practical matter, there will be more than one lobbying communication in almost all instances of successful lobbying. In that sense the "more than one lobbying contact" threshold under the LDA is largely superfluous.

For registration purposes the crucial LDA threshold is the 20% requirement: there is no lobbyist under the LDA (and therefore no registration obligation may attach) unless the person who makes the requisite two covered lobbying communications also engages in "lobbying activities" on behalf of the client for 20% or more of the time during a three month period devoted to services for that client. "Lobbying activities" include both covered lobbying communications and efforts in support of those (for example, strategy sessions with a client before a meeting with a legislator or research done to prepare a memorandum for the covered official to present information and arguments in favor of a particular decision sought from the official).

There is no doubt but that arbitrary lines are inevitable in almost all legal contexts. But experience suggests that the 20% threshold is inconsistent with the purposes of the LDA, or really any other effective disclosure scheme. Indeed, a recent report and resulting legislative reform recommendation from a task force of the American Bar Association (cited in the References for this presentation) rejects the 20% threshold on that basis.

First of all, an individual lobbyist can do an awful lot of work for a client and achieve very impressive results and still devote to lobbying activities less, perhaps a lot less, than 20% of the time he or she bills the client. Secondly, to avoid registration all a client need do is allocate work loads so that no one person working on its behalf engages in lobbying activities more than 19.999. . .% of his or her time. If successful, that allocation among employees does not mean that substantial and very effective lobbying is not being done to advance the client's interests. While no rigorous empirical studies have been done with regard to instances of non-registration under the LDA, the decline in registration since 2007 (see Table 1 above) may be explained, in part, by readjustment of lobbying workloads to just below the 20%

trigger—without really changing the magnitude of the influence of that lobbying effort. And, of course, the ability to take advantage of tactics like that is facilitated by the slipperiness (at the margin) of the definition of "lobbying activities," which could be interpreted narrowly by some clients and their advisors.

Then what about lowering the percentage to 10%, 5%, or even 1%? The problem is that there is no necessary correlation between the percentage of time in the abstract devoted to lobbying activities and the significance or impact of those.

It is submitted that, if the main purpose of a lobbying disclosure regime is to capture lobbying campaigns where a lot is at stake and where the risks to the public and the governmental processes presented by non-disclosure are, therefore, particularly high, then a threshold for registration expressed solely in monetary terms makes the most intuitive sense. If, for example, a lobbying firm is paid a fee of $100,000 to defeat a particular bill, in most people's experience that's a lot of money and it is fair to assume that we have identified a determined, high stakes effort to effect governmental decision-making. By the same token, if a client spends $100,000 to finance a lobbying campaign, the same conclusion is warranted. Of course, what is considered "a lot of money" varies from locality to locality and from nation to nation. Interestingly, despite the wealth of the United States and the magnitude of monetary resources that flood the political arena at the national level, the thresholds under the LDA (adjusted every four years for inflation) are quite modest: $3,000 of income in a quarterly period for a lobbying firm working on behalf of a third party and $12,500 in expenses over that same period for an organization that lobbies through its own employees. Both thresholds focus on money earned or spent for lobbying activities. Such thresholds appropriately capture not just the fees or expenses attributable to lobbying communications to covered officials, but also the preparatory and other work performed to help such communications achieve their purposes. The LDA's definition of lobbying activities seeks to capture these (and other support work), though, like many legal concepts, this definition contains significant vagueness at the margins. I would argue that it is good enough, all things considered, to capture the core of what comprises the elements of a modern lobbying campaign.

It should be noted that both the LDA thresholds and the income and expense figures disclosed on periodic reporting forms are to be determined based on "estimates" where those are rounded to the nearest $10,000. This avoids overly detailed record-keeping and permits considerable freedom in coming up with acceptable techniques for arriving at the final figures determining the need to register and what to report. Moreover, even where the lobbying efforts have focused on several issues pending before a variety of administrative and/or legislative forums, no allocation is required by issue or by any other category. This further minimizes recordkeeping and reporting duties. At the same time, of course, all of this diminishes the value of disclosed information to those interested in how much effort was put into which issues and as to which decision-makers; and it is hard to argue that this is not a significant loss in light of the purposes that can be served by lobbying disclosure.

d. Organizations exempt from disclosure. It might be tempting to argue that some entities, by their very nature, do not raise the problems sought to be avoided by a disclosure regime and should, therefore, be exempt from registration. "Charities" come to mind as a possible category where exemption might be urged. The US

Supreme Court has found that common law standards for defining a charity require that the entity serve a "public purpose" without running afoul of "public policy."

However, the arguments in favor of exempting certain categories of entity, whether charities or others, are difficult to accept because, as I have noted above, the nature of representative government itself requires disclosure; in all cases we are dealing with the attempt by a particular segment of the society to achieve its distinct agenda through the people's government. Moreover, whether an entity is in fact serving a "public purpose," assuming that means a purpose that benefits the population generally or particular sectors thereof, is often in the eye of the beholder. An organization seeking legislation to expand oil drilling in sensitive areas might claim that it is serving the public's need for a cheaper or more dependable fuel supply, while an environmental organization might view the increase in fossil fuel availability as a public detriment, being a potent factor in delaying the development of renewable fuels, a key to avoiding the adverse effects of global warming.

In short, distinguishing among lobbying clients in terms of which have to register based on their stated purposes or similar grounds is insupportable given the basic rationale for lobbying disclosure, the risks of injecting arbitrary (and politically charged) distinctions into the heart of the disclosure regime, and the incentives it affords to manipulation in order to avoid disclosure. No such distinctions are made in the LDA in terms of registration, with the narrow exception of treating lobbying communications by certain religious organizations as insufficient to trigger registration except when made by lobbying firms hired to represent them.

4. What level of information should be on [the register]?

The basic format for a registry includes two types of filings, the initial registration document and the periodic update. With regard to the former, one of the issues that arises is the required timing, which should be several weeks prior to the commencement of lobbying activities if those are anticipated, but, in all events, no later than several weeks after the lobbying commences. With regard to periodic reporting, long lag-times in updating information contained in the initial registration and offering snapshots of the lobbying as it goes forward defeat the purposes of a disclosure scheme, in particular the ability of the public and lawmakers to know what is going on and respond accordingly. Under the LDA, periodic reporting is now on a quarterly basis (it used to be semiannual). That has seemed to work well so far, though there have been some complaints in terms of the burdens created. The nature of the disclosures minimally required for an effective regime (detailed below) does not suggest that more, rather than less, frequent reporting will be overly burdensome in most instances.

In terms of the disclosures required, the crucial ones include the following:

1. The name of the registrant. Depending on the registration scheme, that could be an individual lobbyist, the "employer" of the lobbyist (i.e. the lobbying firm or organization that lobbies on its behalf), or the client (where a consolidated registration and reporting scheme is mandated, as discussed above).

2. The name of the client if not disclosed under (1). This issue can get complicated, as I will discuss below.

3. The name(s) of the individual lobbyist(s) who are expected to be active (in the initial registration) and who were active during the reporting period (in the periodic updates).

4. The former government positions held by those listed lobbyist(s) within the last several years. Where, as in the US, there are restrictions on lobbying a former government employer of the lobbyist, this information may be valuable to suggest possible violations of those restrictions. But even if those restrictions do not exist or are not terribly limiting, the public has a right to know of instances where someone might be using the information and contacts gained as a result of government service to aid the lobbying efforts of a private entity.

5. The specific issues as to which lobbying is expected (initial registration) and has already taken place (the periodic report). The statement of issues should be sufficiently detailed as to be reasonably informative and to permit full-text searches of the registration database. No disclosure of a summary of actual communications need be required in light of the record-keeping, reporting and other burdens presented, though, in light of the purposes of a disclosure scheme, such information would be of immense value. (Where a governmental log of meetings with non-governmental entities is required by some other law or regulation, some such summary might already be available via what, in the US, is known as a freedom of information request by a member of the public.)

6. Identification of, at least, the government entity contacted (e.g. the Parliamentary committee, the executive agency, etc.) The more specific identification the better.

7. Where feasible, the disclosures under (4), (5), and (6) should be arranged by lobbyist, and not separately laid out, in order to increase the informative nature of the filing. (This is not the case under the LDA as currently in effect.)

8. An estimate of the amount of money earned from lobbying during the reporting period (where the registry requires that “contract” lobbyists or their employers register) and an estimate of the amount of money expended for lobbying during the reporting period (where registration is required of persons lobbying on their own behalf or where a consolidated reporting system exists). Generous rounding conventions can be permitted along with reasonable flexibility in adopting methods to calculate estimates.

Item (2) raises difficult issues of associational privacy where the client is an association, coalition or other entity and the lobbying is intended to advance the interests of the members and contributors to the formal entity identified as “the client” on the registration form and periodic reports. The purposes of disclosure are significantly compromised where the named “client” is effectively a shell for others to

achieve their purposes without public notice. I am not in the position to know if lobbying in Scotland presents this type of concern. In the US, where coalition lobbying is very common, the LDA provides for some, though not complete, disclosure of significant contributors to lobbying campaigns even where those contributors are not treated, for disclosure purposes, as "the client."

5. What are the likely cost implications of registration for groups that lobby.

I am not aware of any reliable empirical studies of the compliance costs under the LDA for lobbying firms and organizations that lobby on their own behalf. While now and again some persons subject to the law have complained about the frequency of reporting, there has been, to my knowledge, no widespread resistance to the basic information disclosure described above as it exists under the LDA on the basis of financial burden. In many instances, lobbying entities have simply adopted regular routines to maintain necessary records and input required data into registration and reporting forms. Indeed, there have been software programs developed to aid in filing registrations and reports.

With further regard to the issue presented, the Committee might be interested in the results of the most recent annual report on LDA compliance issued by the US Government Accountability Office. The GAO noted that

> (a)s part of our review, 90 different lobbying firms were included in our sample. Of the 90 different lobbying firms in our sample, 32 reported that the disclosure requirements were "very easy" to comply with, 39 reported they were "somewhat easy" and 19 reported that the disclosure requirements were "somewhat difficult" or "very difficult". Last year, we also asked the lobbying firms in our sample if they found the disclosure requirements easy to meet. Of those 90 firms, 61 agreed that the requirements were "easy" to meet, 25 reported that requirements were somewhat easy" to meet, and 4 reported that the disclosure requirements were "not easy" to meet.

The annual GAO audits of lobbyist compliance and LDA administration are required by the LDA itself, are based on the high standards for statistical accuracy employed in GAO investigations generally, and contain significant details regarding the operation of the LDA that might be of interest to the Committee. I have, therefore, included the report for 2012 (issued April 2013) as Attachment 3 to this testimony.

6. How should [the register] be maintained and who should maintain it? What sanctions should there be for failure to register lobbying activity? How will compliance be monitored?

This set of questions raises the basic issue of administration which can be treated comprehensively below.

Under the LDA, the constitutional separation of powers, along with various other concerns, resulted in what, to an outsider, might appear to be a peculiar division of authority between Congress and the Executive Branch for LDA administration and enforcement. Legislative branch officials--the Secretary of the Senate and the Clerk

of the House of Representatives--have joint responsibility for receiving registrations and quarterly reports, providing guidance to the lobbying community with regard to compliance obligations, maintaining and making available the database of filings, reviewing filings for compliance with the law, and notifying persons subject to the statute of findings of potential violation. Further enforcement duties in terms of filing civil and criminal actions in court rests with the United States Attorney for the District of Columbia.

The peculiarities of the US system are really unimportant for current purposes, particularly in light of the very different allocation of governmental authority that exists in Scotland. However, regardless of the authority or authorities charged with the administration and enforcement of any Scottish lobbying disclosure regime, certain fundamentals should be observed:

1. The administering authority or authorities should be charged with giving guidance regarding compliance obligations to regulated entities, both in general and in response to particular inquiries.

2. All filings should be made electronically to insure that their content is quickly available via the Internet to the public at large.

3. The electronic database of filings should be fully searchable by categories (e.g name of client, entity lobbied, etc) as well as by text (e.g. key word or phrase). The lobbying records identified by any search should be downloadable. Moreover, the entire database itself should be downloadable in order to allow users to extract information in such a way as to reveal various characteristics of the lobbying activity that might not otherwise be easily identified.

The up-to-date nature of the database and facilitation of access to the information contained therein are absolutely essential to achieve the purposes of the lobbying disclosure law. As in the United States, undoubtedly sophisticated watchdog groups will serve as valuable intermediaries in mining the data and making their findings available to the public at large and various interested sectors thereof.

4. Filings should be reviewed as quickly as possible to identify issues of non-compliance and necessary follow-up should not be long delayed. Identification of persons who fail to register where required to do so is far more difficult, though not impossible.

5. Sanctions for non-compliance should include both monetary penalties, imprisonment in very serious cases, and bars on lobbying by a lobbyist who fails to comply with disclosure obligations. There is no right to hire a particular lobbyist if that lobbyist has committed serious violations of law. (This situation is analogous to the case of a disbarred attorney who cannot be hired to provide legal advice.) At the same time, however, temporary or permanent bans on lobbying imposed on persons and entities when they are seeking to advance their own interests are probably not a viable sanction in light of the fundamental nature of the right to lobby. In short, it is one thing to bar hiring a

particular lobbyist who has acted in contravention of ethical or legal constraints; it is quite another to bar lobbying entirely on behalf of a person or entity even if it is responsible for violations of the disclosure law.

6. In most cases, lobbying disclosure violations are relatively minor, for example, the failure to provide some required information or the failure to file several required reports at all or on time. Under the LDA, literally thousands of such infractions have been identified over the years and, in most cases, they have been rectified simply by filing an amended form or filing reports retroactively without any additional sanction imposed.

However, some situations call for more formal sanctions. Yet the resources generally needed to file and pursue civil and criminal penalties in the US courts discourage the imposition of sanctions except in extreme cases. (To date there have been only a handful of formal enforcement actions filed under the LDA, all of them seeking civil and not criminal penalties.) Accordingly, where it is possible to create an expedited administrative route to sanctioning that does not involve the full panoply of judicial trial, that option should be considered. At least in the US, administrative imposition of civil penalties is a common technique for facilitating enforcement, particularly in cases where the violations are not deemed terribly serious. Indeed, the administrative agency does not need the cooperation of the authority having an almost complete monopoly of representing the government in court (the Department of Justice on the national level).

And, of course, adverse publicity can be the best punishment and deterrent available and it does not require formal administrative or judicial procedures to implement. Publication of a list of significant violators of the disclosure law and issuing reports regarding particularly egregious instances of non-compliance should, therefore, also be options available to the administering agency.

7. What are the implications of a register for (a) the Parliament, (b) MSPs, (c) organisations that lobby and (d) Ministers and civil servants?

I believe much of the prior discussion provides some information relevant to this question. However, if this issue also reflects a concern that lobbying disclosure will interfere with the ability of government officials to obtain the information they need to do their jobs, I know of no complaints or concerns of that nature that have been raised with regard to administration of the LDA. And, of course, the financial costs of compliance fall entirely on the regulated community. The costs of administration must be absorbed in the government's budget, but those are comparatively minor from US experience

8. [What] other changes could be made to improve transparency in lobbying in Scotland?

In responding to this question, let me first return to the recent history of US lobbying law for a general lesson it offers, and then I will focus on the issue of extending disclosure beyond the items previously discussed.

Most US lobbying scandals have traditionally been short-lived in public memory: they capture headlines one week and almost entirely disappear from view not long after. The series of lobbying scandals that came to light, in part based on LDA disclosures, during 2004-06 and involved Republican lobbyist Jack Abramoff as a leading figure was unusual in that regard. The fallout continued for the better part of the decade: the Republican party suffered defeat at the polls during the 2006 mid-term elections and in the 2008 Presidential election; the Honest Leadership and Open Government Act of 2007 significantly toughened the LDA and other laws implicating lobbyists; public opinion of lobbyists plummeted; and the Obama Administration implemented its own series of, what some might call, anti-lobbyist restrictions, including bans on the use of lobbyists in some contexts and tightened "revolving door" restrictions. I am not claiming here that the Abramoff controversy was solely responsible for all these events, but it surely was a factor roiling the political waters in ways that facilitated these developments. It is fair to say that professional lobbyists have viewed some of the fallout as unfair to them as well as counter-productive. Still, a December 2013 Gallup poll seeking public views regarding the honesty and ethical standards of various professional groups listed lobbyists in last place (with, not surprisingly, Members of Congress in the next to last position).

What is the lesson here? Lobbying scandals can play into particularly harsh results impacting on highly ethical, law-biding, and public-spirited lobbyists; they can create what some view as over-reaction and unnecessary hurdles to lobbyists' effective representation of their clients. Not surprisingly, the surveys of lobbyists described earlier (Tables 2 and 3) indicated their support for lobbying disclosure even if mandatory. Such a regime may minimize the potential for scandal and show that the profession is not afraid of disclosure, but welcomes the opportunity to operate "in the sunlight," so to speak.

On the positive side, the Abramoff scandals helped to focus attention on the increasingly important nexus in the US among lobbyists, money, and politicians. For example, lobbyist "bundling" of contributions for the campaign coffers of elected officials was subjected to increased scrutiny. One of the results of the scandals was an amendment to the LDA mandating that LDA registrants and lobbyists file semi-annual reports of their political contributions and disbursements to or for the benefit of congressional and executive branch officials. Such contributions and disbursements are subject to an extraordinarily detailed set of statutes and regulations dealing with campaign finance and gifts to Members of Congress, their staffs, and executive branch officials. (As it turns out, the responsibility for dealing with bundling disclosure was vested in the Federal Election Commission that deals with campaign finance, not the Secretary of the Senate and Clerk of the House.) Among their benefits, the newly mandated LDA disclosures assist in policing compliance with those statutes and regulations as well as in deterring non-compliance therewith.

I am not in a position to say whether the nexus, if any, that exists between lobbyists, money, and politicians in Scotland now resembles or is likely in the foreseeable future to resemble that found in the United States. I sincerely hope that it does not now and will not going forward. But if there are concerns in that regard, the Committee may wish to delve deeper into how the US law attempts to regulate this area for whatever lessons may be helpful.

9. Should there be a Code of Conduct for lobbyists? Should it be statutory or voluntary?

There is no Code of Conduct for lobbyists mandated by the LDA. All the LDA does is urge the lobbying community to develop standards for self-regulation. Where a lawyer is a lobbyist who provides both legal and lobbying services, he or she may be subject to professional ethical rules in rendering lobbying services. Also, the Association of Government Relations Professionals (previously known as the American League of Lobbyists) has an ethical code applicable to its members (many of whom are lawyers). I have some familiarity with the Canadian lobbying system, which, at the federal level, does have a Code of Conduct and my sense is that that Code is viewed as an important aspect of Canada's lobbying regime.

Having said that, I cannot base any recommendation for a Code of Conduct on detailed empirical research that I am aware of; none exists to my knowledge. At the same time, given the low public esteem of the lobbying community not just in the US but abroad (as noted above), anything that can be done to show the public that lobbyists have high standards for their professional conduct has much to recommend it. Low public esteem for lobbyists is clearly not helpful to lobbyists in doing their work and, thereby, ensuring that government effectively carries out its representative function, including the identification of what is in the public interest. A Code of Conduct for lobbyists is one important step in maintaining public confidence in lobbyists and the government they seek to influence.

I have tried to avoid detail that might be unnecessary to the Committee, while at the same time I did not want to write at too high a level of generality for fear of offering the Committee too little assistance. If the Committee needs additional detail or if there are other lobbying issues of interest to the Committee as to which my background may be helpful, I would be happy to respond to additional requests for information. In that regard, I will try to provide the information in the manner deemed most appropriate to the Committee's needs, whether in writing, via conference call or video conference, or in person if that is feasible.

Thanks again to the Committee for this opportunity to offer these views.

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